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January 4, 2000

Magalie R. Salas, Secretary
Federal Communications Commission
Washington, D.C. 20554

In re: WT Docket No. 94-147
James A. Kay, Jr.

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

On December 30, 1999, I submitted, in the above-captioned matter, a pleading entitled Supplement to Reply Exceptions. I neglected to include Attachment A which was a copy of a November 18, 1999 letter issued by Terry L. Fishel of the Wireless Telecommunications Bureau staff. I am therefore tendering a copy of that letter for association with the pleading. I apologize for any inconvenience this inadvertent oversight may have caused.

Insofar as this is a hearing matter pending before the Commission on appeal, an original and 14 copies of this letter are being filed.

Kindly direct any questions or correspondence concerning this matter to either me or my co-counsel, Aaron Shainis, Esquire.

Very truly yours,



Robert J. Keller
Counsel for James A. Kay, Jr.

cc: John I. Riffer, Esquire
John J. Schauble, Esquire
William H. Knowles-Kellett, Esquire

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Federal Communications Commission

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In Reply Refer To
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Robyn G. Nietert, Esquire
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Re: James A. Kay, Jr. (Kay) Petition to Dismiss or Deny or Petition for Reconsideration
A-1-A Repeater Company (A-1-A) application (FCC File No. D034699)¹

James A. Kay, Jr. Petition for Reconsideration and Supplement to Petition to Deny
Harry A. Thompson, III (Thompson) dba 1st Mobile Communications
Reinstatement of Expired Authorization WPAH737 (FCC File No. 9709D092480) and
Assignment of Authorization WPAH737 to A-1-A Repeater Company

A-1-A Repeater Company Petition for Reconsideration & Reinstatement
Application with FCC File No. D034699

Dear Petitioners:

This correspondence replies to the subject filings and associated pleadings.

Thompson was initially granted authority under call sign WPAH737 for conventional SMR operation on 851.4125 MHz on South Mountain near Santa Paula, CA on August 21, 1992. License WPAH737 provided only for base station operation on the frequency. At the time of Thompson's grant, end users of SMR systems were licensed separately. On August 5, 1992, the Commission adopted PR Docket No. 92-79, 7 FCC Rcd. 5558 eliminating separate licensing of end users on SMR systems. This decision which was released August 31, 1992, and became effective on October 8, 1992, contrary to

¹ Kay's pleading references the FCC File No. 961100051. 961100051 is actually the Frequency Advisory Coordination number assigned to A-1-A Repeater Company's application for assignment and modification.

Robert J. Keller, Esquire
 Harry A. Thompson, III
 Robyn G. Nietert, Esquire

Thompson's statements in the *Opposition to Petition For Reconsideration and Supplement to Petition to Deny* @ 4, required licensees of conventional SMR systems to file applications for modification to add mobile units.² Because station WPAH737 was licensed without mobiles, Thompson was required to file a modification application to authorize the use of mobiles that were to be counted toward the loading of the station.³ Further, Section 90.135(a)(5) required submission of a Form 574 to the applicable frequency coordinator when changing the number of mobile units on non-exclusive assignments in the 800 MHz band.⁴ Such requirements were not satisfied by Thompson's response to the Commission's April 23, 1993 FCC 800A.

Since the channel is licensed for 70 or more mobiles within the requisite co-channel separation distance,⁵ Thompson may not license mobile units under WPAH737. Nevertheless, the Commission permits end users operating on other stations to roam between stations without separate authorizations.⁶ Kay argues that Thompson's license canceled automatically pursuant to Section 90.155(a) because there were no mobiles licensed to Thompson under WPAH737. Because roaming units may be served without separate designation on a license, however, and Kay's arguments regarding this issue are based exclusively on licensed mobile loading, Kay has not demonstrated that Thompson's license WPAH737 canceled automatically due to Thompson's failure to license mobiles on the authorization.^{7 8} Thompson would be entitled and limited to providing service to roamers under WPAH737. We believe these circumstances distinguish Thompson from *Abraham Communications, Inc. (Abraham)*.⁹ Service provided by Abraham was limited to its taxi dispatch operations.¹⁰ The pleadings in this matter do not indicate to whom Thompson provides service and do not rule out the possibility that service is in fact provided to roamers. Kay has therefore not provided sufficient evidence that WPAH737 canceled automatically due to it not being constructed and placed-in-operation.¹¹

² See *In the Matter of Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order*, PR Docket No. 92-79, 7 FCC Rcd. 5562, ¶¶ 24-25.

³ See *Amendment of Part 90 of the Commission's Rules Governing the Application Filing Procedures for SMRS Operators and End-Users in the 800 MHz Private Land Mobile Band, Report and Order*, PR Docket No. 85-302 (FCC 86-232), 51 Fed. Reg. 18794 (1986).

⁴ See Section 90.135(c) (1992).

⁵ James A. Kay, Jr. is licensed under WPAZ639 for conventional SMR operation with 72 mobiles at 41 km from Thompson's transmitter location; James A. Kay, Jr. is licensed under WNJA910 for trunked SMR operation with 1200 mobiles at 41 km from Thompson's location; Geoffrey Mykleby is licensed under WPHX735 for conventional SMR operation with 70 mobiles at 90 km from Thompson's location; and Marc Sobel is licensed under WNPY680 for conventional SMR operation with 72 mobiles at 123 km from Thompson's location.

⁶ See *Report and Order*, PR Docket No. 85-302 (FCC 86-232), 51 Fed. Reg. 18794 (1986).

⁷ Kay acknowledges in his *Petition for Reconsideration and Supplement to Petition to Deny* at 4 that the Thompson channel is operational.

⁸ See *In the Matter of Joy Rheins Finders Preference Request for Specialized Mobile Radio Station WNSA1957, Licensed to Jeff Comm Corp. at Grieg, New York, Memorandum Opinion and Order*, DA 99-1951, rel. September 22, 1999.

⁹ See *Abraham Communications, Inc., Memorandum Opinion and Order* (FCC 96-324, rel. September 18, 1996).

¹⁰ *Id.* at 1.

¹¹ See *Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations (Report and Order)*, PR Docket No. 90-481, 6 FCC Rcd. 7297 (1991).

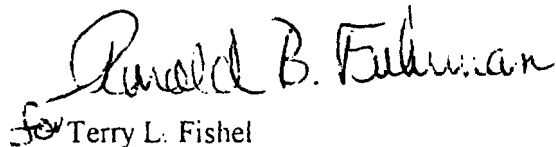
Robert J. Keller, Esquire
Harry A. Thompson, III
Robyn G. Nietert, Esquire

We agree with Kay that Thompson's application assigned file no. D092480 and received by the Commission on September 10, 1997 to reinstate WPAH737 and license mobiles on the authorization should have been served on Kay pursuant to Section 1.1200.¹² We admonish Thompson for filing the subject application. We note however, that Kay's rights were preserved by his timely filed Petition for Reconsideration and Supplement to Petition to Deny.

Kay has failed to show Thompson is not a real party in interest in the subject filings, Thompson is guilty of misrepresentation and lack of candor, and a evidentiary hearing is warranted to examine the qualifications of Thompson or A-1-A Repeater Company to be or remain Commission licensees.

For the reasons stated above, the Commission's action of October 14, 1997 under FCC File No. D092480 that reinstated WPAH737 and authorized mobiles on the license is hereby set aside. Instead, authorization WPAH737 will be reissued without mobiles. Kay's Petition for Reconsideration of the reinstatement of expired authorization WPAH737 is granted on that basis and otherwise denied. The Commission's action of August 25, 1997 that dismissed application D034699 is set aside and the application is granted-in-part to provide for assignment of station WPAH737 from Harry A. Thompson, III dba 1st Mobile Communications' (Thompson) to A-1-A Repeater Company (A-1-A). The assignment is granted however, without mobiles designated on WPAH737. A-1-A's operation of WPAH737 is limited therefore to providing service to roamers. A-1-A's Petition for Reconsideration & Reinstatement is hereby granted on that basis and otherwise denied.

Sincerely,



~~for~~ Terry L. Fishel
Deputy Chief, Licensing and Technical Analysis Branch
Commercial Wireless Division

¹² The lack of licensed mobiles on license WPAH737 was the basis for Kay's Petition to Dismiss or Deny or Petition for Reconsideration filed on October 9, 1996 against the assignment of WPAH737 from Thompson to A-1-A Repeater Company.